(49862)

FILE COPY

SUPREME COURT, U.S.
FILED
NOV 13 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-237

VINCENT R. MANCUSI, Superintendent of Attica Correctional Facility,

Petitioner,

against

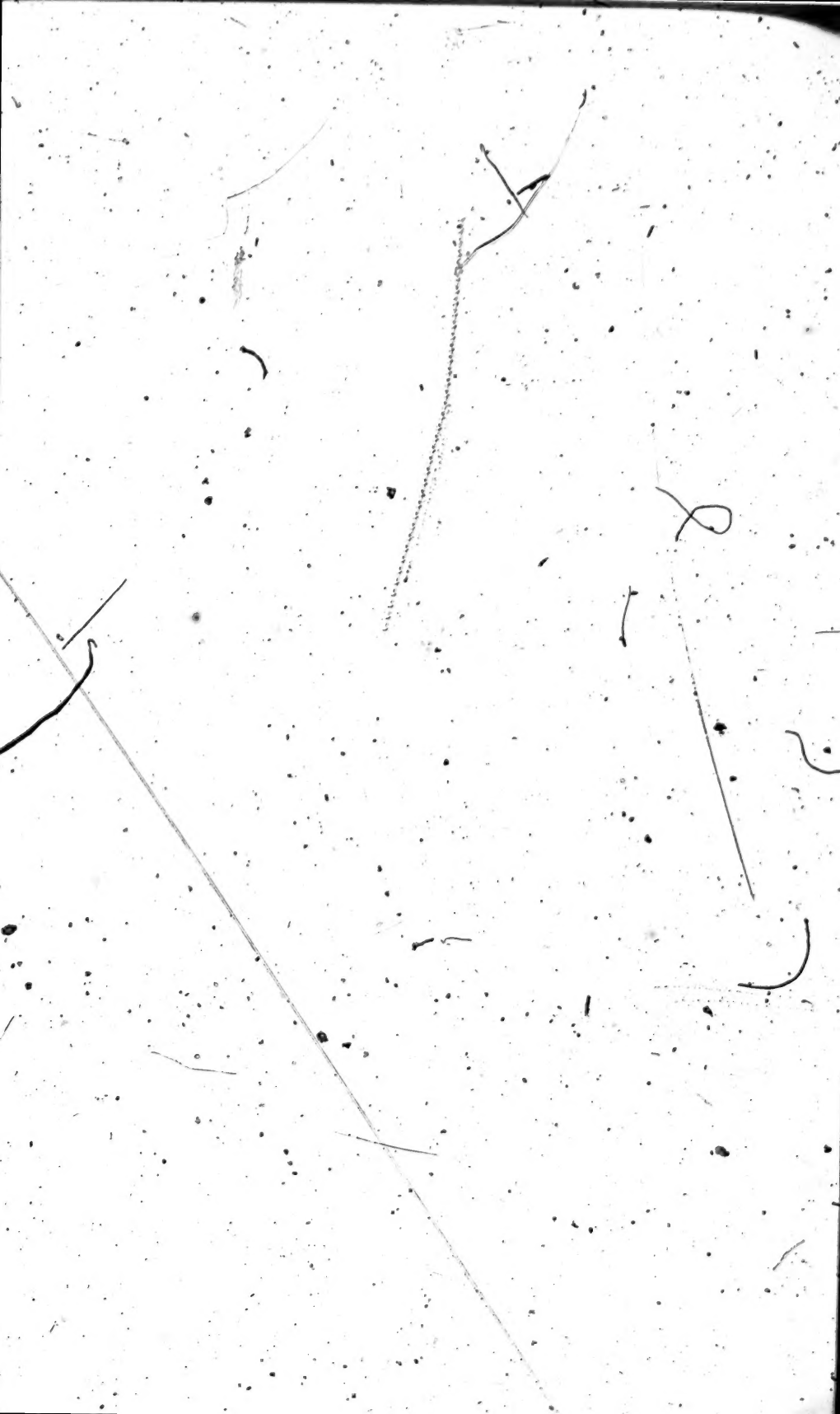
WILLIAM C. STUBBS,

Respondent.

BRIEF FOR RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRUCE K. CARPENTER
Attorney for Respondent
Woodin & Carpenter
14 Lester Building
57 East Fourth Street
Dunkirk, New York 14048

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.



SUBJECT INDEX.

	PAGE
Table of cases	I
Table of statutory and constitutional provisions	II
Statement of case	1
Argument	2
I. The record as not clearly presenting the issues sought to be heard	2
II. Possible mootness	3
III. No conflict with decisions of this Court; prior recorded testimony admitted in violation of confrontation clause	4
A. No effort to obtain presence of witness	4
B. Prior testimony unusable, as without effective cross examination	5
IV. Error not shown to be harmless	7
A. No conflict with decisions of other Courts of Appeals	7
B. Prejudicial effect of using the prior testimony	8
Conclusion	10

TABLE OF CASES.

Bailey v. United States, 410 F. 2d 1209 (10th Cir.) cert. den. 396 U. S. 933	7
Barber v. Page, 390 U. S. 719	1, 3, 4, 5
Berger v. California, 393 U. S. 314	1
California v. Green, 399 U. S. 149	1
Chambers v. Maroney, 399 U. S. 42	6
Chapman v. California, 386 U. S. 18	8
Fahy v. Connecticut, 375 U. S. 85	8
Glasser v. United States, 315 U. S. 60	7

PAGE

Goldwasser v. Brown, 417 F. 2d 1169 (D. C. Cir.) cert. den. 397 U. S. 922 5
LeBaron v. Crombie, 14 Mass. 235 5
Maryland v. Baltimore Radio Show, 338 U. S. 912 3
Massachusetts v. Painten, 389 U. S. 560 3
Motes v. United States, 178 U. S. 458 5
Peterson v. United States, 344 F. 2d 419 (5th Cir.) 5
Pettit v. Riley, 62 Wash. 2d 515, 383 P. 2d 889 5
Pointer v. Texas, 380 U. S. 400 5
Regina v. Scaife, 17 Q. B. 238; 2 Den. C. C. 281; 5 Cox, C. C. 243 5
State v. Cumbo, 9 Ariz. App. 253; 451 P. 2d 333 5
Stubbs v. Bomar (U. S. D. C. M. D. Tenn.; Civil Action No. 3585) 6
United States ex rel. Stubbs v. Mancusi, 442 F. 2d 561 ..... 1, 4, 6, 8, 10
Wilbur v. Seldon (N. Y. Sup. Ct.), 6 Cowen 165 5

TABLE OF STATUTORY AND CONSTITUTIONAL PROVISIONS.

Fourteenth Amendment, Constitution of the United States 5, 11
New York former Penal Law, § 1941 subd. 1 3
Sixth Amendment, Constitution of the United States 2, 4, 5, 11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-237

VINCENT R. MANCUSI, Superintendent of Attica Correctional Facility,

Petitioner,

against

WILLIAM C. STUBBS,

Respondent.

BRIEF FOR RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF CASE

An earlier Tennessee conviction was used by the State of New York to give the respondent William C. Stubbs increased punishment following a New York conviction. After exhausting his state remedies, Mr. Stubbs applied for habeas corpus relief to the United States District Court for the Western District of New York. In *United States* ex rel. *Stubbs* v. *Mancusi*, 442 F. 2d 561, the Court of Appeals for the Second Circuit reversed with one judge dissenting, the decision denying relief. On May 19, 1971 a petition for rehearing was denied, and a suggestion for argument *in banc* was denied, no active circuit judge having been heard in favor; the respondent Stubbs is to be resentenced in the Monroe County Court of the State of New York.

The court below held that in the light of *Barber* v. *Page*, 390 U. S. 719, 724-725, *Berger* v. *California*, 393 U. S. 314, 315, and *California* v. *Green*, 399 U. S. 149, the Tennessee

conviction had been obtained in violation of the confrontation clause of the Sixth Amendment. At the Tennessee trial the prosecution's primary witness did not appear, but earlier testimony of his was read into evidence. No effort had been made by the prosecuting authorities in Tennessee to obtain this witness' attendance at the trial. It was shown only that the witness had moved to Sweden.

ARGUMENT

I. *The record as not clearly presenting the issues sought to be raised.*

The petitioner seeks to raise four questions, all relating to the validity of the Tennessee conviction (see pp. 2-3 of the petition). A transcript of the Tennessee trial is not included in the present record.[1] The crucial records came to the attention of the Court of Appeals below, because both of the present parties invited judicial notice of them. The interests of justice led the court below to sift through records from many places before striking down the Tennessee judgment.

The peculiar circumstances of this case, furthermore, have prevented the government of Tennessee from being heard below. Mr. Stubbs' second Tennessee trial took place in 1964 and his New York trial in 1966. The parties both in Tennessee and New York did not then have a chance to focus upon the present issues in the light of the controlling

[1] In denying relief the United States District Court for the Western District of New York noted that it had considered only the records of the New York proceedings (¶ 4 of the decision, reproduced as appendix D to the petition for certiorari, p. 41a). Neither did the New York Monroe County Court consider them before imposing sentence. See pp. 44-55 of the transcript of proceedings of October 6, 1966.

decision, *Barber* v. *Page*, 390 U. S. 719, which was handed down in 1968.

This Court may well conclude that the present record is not sufficiently clear and specific to warrant decision upon the constitutional questions sought to be raised by the petitioner. Compare *Massachusetts* v. *Painten*, 389 U. S. 560, 561 and the opinion of Mr. Justice FRANKFURTER in *Maryland v. Baltimore Radio Show*, 338 U. S. 912, 918, who wrote: "A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening."

II. *Possible mootness.*

Following the mandate of the court below, proceedings against the respondent Stubbs have resumed in the Monroe County Court of New York. The district attorney has filed an information charging the respondent with being a second felony offender as a result of a 1953 *Texas* conviction for breaking and entering.[2] At the time of the writing of this brief the Monroe County Court has already determined that the respondent is the same person who was convicted in Texas. Yet to be determined is whether the Texas conviction was constitutionally obtained. The present controversy, arising from the use of the Tennessee conviction, may well become moot.

---

[2] The applicable statute, former New York Penal Law, § 1941 subd. 1, permits a sentence for second *or* third felony offenders of double the maximum allowed for first offenders.

III. *No conflict with decisions of this Court; prior recorded testimony admitted in violation of confrontation clause.*

A. No effort to obtain presence of witness.

The first reason advanced by the petitioner for allowance of the writ of certiorari is that the decision below constitutes "a significant departure from the prior decisions of this Court" (petition, p. 3). The decision below, *United States* ex rel. *Stubbs* v. *Mancusi*, 442 F. 2d 561, meticulously applied the rules announced in *Barber* v. *Page*, 390 U. S. 719, in which the Court stated: "The Court of Appeals majority appears to have reasoned that because the State would have had to request an exercise of discretion on the part of federal authorities, it was under no obligation to make any such request. Yet as Judge Aldrich, sitting by designation, pointed out in dissent below, 'the possibility of a refusal is not the equivalent of asking and receiving a rebuff.' 381 F. 2d, at 481. In short, a witness is not 'unavailable' for purposes to the foregoing exception of the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial. The State made no such effort here, and, so far as this record reveals, the sole reason why Woods was not present to testify in person was because the State did not attempt to seek his presence. The right of confrontation may not be dispensed with so lightly." (390 U. S. 719, 724-725)

The confrontation clause of the Sixth Amendment is very straightforward, providing: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him:".[3]

[3] At the time the Sixth Amendment was adopted mere absence from a jurisdiction justified no exception to the right of confrontation.

(Footnote continued on following page)

The petitioner seeks to distinguish *Barber* v. *Page*, 390 U. S. 719 from the present case, because the witness whose presence the Tennessee authorities did not attempt to seek, was in Sweden and not in a federal penitentiary 225 miles away in another state. In this era of jet travel there is no reason to draw such a brutal distinction between travel from Sweden and travel from Texas. The two California decisions cited on p. 9 of the present petition appear to have involved effort to obtain the witness. *Goldwasser* v. *Brown*, 417 F. 2d 1169 (D. C. Cir.) cert. den. 397 U. S. 922, the other cited by the petitioner, was not a criminal proceeding, and thus does not involve the confrontation clause of the Sixth Amendment.

B. Prior testimony unusable, as without effective cross-examination.

There is a second and independent reason why the Sixth and Fourteenth Amendments render invalid the respondent's Tennessee conviction. Even though a prosecution *has* made a good-faith effort to obtain the presence of a witness, it is not every prior statement of the witness that can be read into evidence. Only when the accused had an effective opportunity to cross-examine the witness at the time his testimony was recorded, can the testimony be used at a later trial. Cross-examination is an essential requirement.[4]

(Footnote continued from preceding page)
The exceptions were (1) death of the witness or (2) absence because of the defendant's connivance. *Regina* v. *Scaife* (1851) 17 Q. B. 238, 242, 244; 2 Den. C. C. 284, 285-286; 5 Cox C. C. 243, 245, 246; *Motes* v. *United States* (1900) 178 U. S. 458, 471-473; *Wilbur* v. *Seldon* (1826, N. Y. Sup. Ct.) 6 Cowen 165; *LeBaron* v. *Crombie* (1817) 14 Mass. 234, 235.

[4] See *Pettit* v. *Rhay*, 62 Wash. 2d 515, 383 P. 2d 889, 893 (cross-examination not permitted); *Pointer* v. *Texas*, 380 U. S. 400, 406-408 (earlier testimony recorded when accused was deprived of counsel); *Barber* v. *Page*, 390 U. S. 719, 722 (discussion of counsel being impeded by ethical considerations); *Peterson* v. *United States* (5th Cir.) 344 F. 2d 419, 421 (issues different when testimony recorded); *State* v. *Cumbo*, 9 Ariz. App. 253; 451 P. 2d 333, 336 (defendant involuntarily absent when testimony recorded).

The testimony read at the 1964 Tennessee trial of the respondent Stubbs had been given at his first trial, in 1954.[5] The court below held that the testimony of the witness had been taken when the respondent Stubbs was effectively deprived of his right to cross-examine the witness (442 F. 2d 561, 563-564). Assigned counsel at the 1954 Tennessee trial were compelled to go to trial without a sufficient time to prepare a defense. For the offenses which allegedly took place on June 11, 1954, the respondent Stubbs was indicted on July 8, 1954, was arraigned and was assigned counsel on July 9, and went to trial on July 12, 1954 over the objection of his counsel. The court below made a careful analysis of the cross-examination attempted of the witness at the first Tennessee trial in the light of the defenses raised, to conclude that the cross-examination of the witness in 1954 was ineffective (442 F. 2d 561, 564). (For further discussion of these factors, see part IV B, below.)

---

[5] The Tennessee convictions were set aside in 1966 by the United States District Court for the Middle District of Tennessee, *Stubbs* v. *Bomar*, Civil Action No. 3585. Contrary to the suggestion made on p. 11 of the petition for certiorari there has been no "clear contravention" of this Court's holding in *Chambers* v. *Maroney*, 399 U. S. 42. A "full and complete" hearing was conducted by the District Court for the Middle District of Tennessee, which held: "The Court is of the opinion that the evidence and the record show that the Constitutional rights of petitioner Stubbs were violated at the time of his trial in the Criminal Court of Sullivan County in that his Court-appointed counsel did not have adequate and sufficient time within which to prepare the necessary defense prior to going to trial, and as a result the petitioner was denied effective representation by counsel." This decision appears to have been accepted by the prosecuting authorities in Tennessee, who promptly awarded the respondent Stubbs a second trial. Certainly, the present proceeding is singularly inappropriate for attacking the setting aside in Tennessee of the 1954 conviction. See the discussion in part I, above.

IV. *Error not shown to be harmless.*

A. No conflict with decisions of other Courts of Appeals.

The petitioner has argued that the court below "in effect eliminated the harmless error rule except where a federal court finds that the trial jury could have reached no other conclusion but guilt—a more rigorous standard than is applied on direct appeal", an interpretation said to be in conflict with the law of four other circuits (petition, p. 14). The petitioner appears to misconstrue the doctrine of harmless error. The six cases cited to show a conflict among the circuits deal with what constitutes sufficient evidence to convict under various federal criminal statutes.[6] Indeed, holdings similar to those in the cases cited can be found in all of the circuits. The distinction between a harmless error issue and a sufficiency of evidence issue is strongly drawn in *Glasser* v. *United States*, 315 U. S. 60, which held as to sufficiency of evidence; "It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." (315 U. S. 60, 80); but which also held: "To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of [his attorney as counsel for a codefendant] is at once difficult and unnecessary. The right to have the assistance of counsel is

[6] The only one of the cases cited, which even peripherally deals with harmless error, is *Bailey* v. *United States*, 410 F. 2d 1209 (10th Cir.) cert. den. 396 U. S. 933, arising from a prosecution for kidnapping and for transporting a victim in interstate commerce for sexual gratification. After discussing at length the sufficiency of the evidence, particularly as against one of defendants, the court then disposed in summary fashion of an argument about the introduction of photographs, holding nothing about them to be inflammatory and that, "If there was a lack of proper foundation for admission, the error did not affect substantial rights of the accused and was harmless." (410 F. 2d 1209, 1217).

too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." (315 U. S. 60, 75-76).

The court below was fully in accord with this Court's decisions on the harmless error rule. See *Chapman* v. *California*, 386 U. S. 18, in which it was held: "There is little, if any, difference between our statement in *Fahy* v. *Connecticut* [375 U. S. 85, 86-87] about 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction' and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. We, therefore, do no more than adhere to the meaning of our *Fahy* case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt" (386 U. S. 18, 24).

B. Prejudicial effect of using the prior testimony.

Whether constitutional error can be excused because harmless, is in essence a factual inquiry. A careful weighing of the evidence was made by the court below (442 F. 2d 561, 564). This Court may not wish to grant certiorari to reexamine the evidence, especially since the records from the State of Tennessee are not part of the certified record in this cause (see part I, above).

The conviction of the respondent Stubbs, was for the murder of a Mrs. Holm (and connected crimes). Although there were a number of witnesses called at the 1964 Tennessee trial, not one of them, save the defendant himself, had observed the homicide and the events leading to it. Mr. Holm, the husband of the deceased, *had* observed the events and had given testimony at the 1954 trial. Over the vigor-

ous objection of Mr. Stubbs' counsel at the 1964 trial (159-164, 173, 174[7]), the testimony of Mr. Holm was read. His testimony was that Mr. Stubbs, who was armed with a pistol (184), forced his way into the Holms' car (186); after driving the car for a while, Mr. Stubbs suddenly shot both Mr. Holm (194) and Mrs. Holm (196-200). Mr. Holm did not testify to any provocation or activity on the part of his wife or himself before Mr. Stubbs started shooting; "When he started shooting, I jumped up and grabbed the gun. Of course, I was too late. He already shot her, but there was one shot fired after that. It went up in the top of the car" (197). While Mrs. Holm was slumping over, Mr. Holm struggled with Mr. Stubbs, got the pistol away from him, and started hammering away with it at Mr. Stubbs' head (200). Later Mr. Stubbs was brought by the police to Mr. Holm's hospital room for identification (206).

The respondent Stubbs' testimony was that he had forced himself upon the Holms at gun point because he was driven by desperation and hunger (242-248). But after he had explained his motivation (249), the Holms made him welcome, Mrs. Holms even suggesting that he put the gun down so that he wouldn't get into trouble going through a town (250). He did this; they passed a policeman with no outcry by the Holms (251). Mr. Stubbs' understanding with the Holms was that when they reached Bristol, Tennessee, he would get out and they would continue on their way (253). Something suddenly happened to alter his perception, "I felt a sharp pain that seem' [sic] to start in my head and go all the way down through me and I reached up with both hands and I heard this loud roar, bang . . . . Stuff started running down my face and down my shirt and

[7] These numbers in the parentheses and those to follow refer to pages of the transcript of the 1964 Sullivan County, Tennessee trial, No. 34449X.

all that I could think of that he has got the gun. Q What did you do? A I just went outside through the car door." (254)

None of the other witnesses saw anything of the homicide or knew anything of the developing relationship between Stubbs and the Holms. Accordingly, any error introducing the prior recorded testimony of Mr. Stubbs was far from being harmless. Mr. Holm's testimony was vital to the conviction.

Even if a brilliant and searching cross-examination of the witness Holm had been conducted in 1954, the impact of Holm's testimony, as the only eye witness to the alleged crime, would have made the error of admitting the testimony at Stubbs' second trial the diametric opposite of harmless.

The prejudice is accentuated, however, by the failure of Stubbs' 1954 counsel (who had been rushed to trial) to make anything but a cursory cross-examination (207-217). There was no examination of Mr. Holm exploring precisely what happened at the shooting, no attempt to establish that the Holms had made Stubbs a guest after his initial criminal incursion. Well founded is the conclusion of the court below, "we cannot declare the absence of any examination of Holm—the only eye-witness to the alleged crime—on this point to be harmless beyond a reasonable doubt" (442 F. 2d 561, 564).

CONCLUSION

Because the records leading to the respondent's 1964 Tennessee conviction now under attack were not introduced into evidence below, because the Tennessee authorities responsible for the conviction have not been heard in the present proceeding, because important stages leading to

the respondent's convictions took place before the controlling decision of this Court was handed down,—the present record is not clear, specific and full. The prosecuting authorities of New York appear to have found a Texas conviction of the respondent, which can be used as a predicate felony for increased punishment. The present proceedings attacking a predicate Tennessee conviction may well become moot.

The decision below is not in conflict with decisions of this Court or with those of other courts. Because the prosecution in Tennessee made no effort to obtain the presence of a witness, the use of prior recorded testimony of the witness at trial deprived the respondent of rights under the Sixth and Fourteenth Amendments. Even if the prosecution in Tennessee had made such a good-faith effort, the prior testimony should not have been used, because the testimony was taken without an effective opportunity for cross-examination. The transcript of the second Tennessee trial clearly demonstrates that the error of using the prior testimony was highly prejudicial; the error most certainly was not harmless beyond a reasonable doubt.

For these reasons, as well as the essentially factual nature of the inquiry below, this Court should deny the petition for certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

WILLIAM C. STUBBS, *Respondent,*

By his attorney,
BRUCE K. CARPENTER.

Dunkirk, New York
November 8, 1971.